Supreme Court, U.S.
FILED
NOV 2 1994

No. 94-364

In the Supreme Court of the United States

OCTOBER TERM, 1994

A. MICHAEL'S PIANO, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
LEONARD SCHAITMAN
MARK C. NILES
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

13pp

QUESTIONS PRESENTED

1. Whether the court of appeals established the correct standard, for application by the district court on remand in this case, to determine whether certain documents are exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552, and Section 21(f) of the Federal Trade Commission Act, 15 U.S.C. 57(b)-2(f).

2. Whether there is a genuine issue of fact concerning whether other documents withheld from disclosure are covered by the attorney work-product privilege.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Anderson v. *Department of Health & Human Servs.*, 907 F.2d 936 (10th Cir. 1990)	7
Aronson v. *IRS*, 973 F.2d 962 (1st Cir. 1992)	7
Black v. *Cutter Laboratories*, 351 U.S. 292 (1956)	6
California v. *Rooney*, 483 U.S. 307 (1987)	6
Hickman v. *Taylor*, 329 U.S. 495 (1947)	9
Kent Corp. v. *NLRB*, 530 F.2d 612 (5th Cir.), cert. denied, 429 U.S. 920 (1976)	9
NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975)	4
SafeCard Services, Inc. v. *SEC*, 926 F.2d 1197 (D.C. Cir. 1991)	9

Statutes:

Federal Trade Commission Act, § 21(f), 15 U.S.C. 57(b)-2(f)	2-3, 4, 5, 6, 7, 8
Freedom of Information Act, 5 U.S.C. 552	2
5 U.S.C. 552(b)(3)	3, 6, 7
5 U.S.C. 552(b)(4)	3-4
5 U.S.C. 552(b)(5)	4, 5, 9

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-364

A. MICHAEL'S PIANO, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 18 F.3d 138. The opinion and judgment of the district court (Pet. App. A18-A21) is unreported, but is reprinted at 1993-1 Trade Cas. (CCH) ¶ 70,112.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1994. A petition for rehearing was denied on May 19, 1994. Pet. App. A22. On August 16, 1994, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 27, 1994. The petition for a writ of certiorari was filed on August 29, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a retailer of Steinway pianos until Steinway terminated that relationship in 1987. Pet. App. A3-A4. Petitioner continued to sell Steinway pianos from its inventory, however, and to service them. *Id.* at A4. In servicing the pianos petitioner allegedly noticed a number of instruments with various construction flaws, and in 1990 approximately 60 of petitioner's customers complained to the State of Connecticut about those flaws and about Steinway's alleged failure to honor warranties. The State transmitted a number of those complaints to the Federal Trade Commission. *Ibid.*

The director of the FTC's regional office ordered an "initial phase" investigation of the Steinway complaints. Pet. App. A4. That investigation was conducted principally by an FTC attorney, with the assistance of a Commission economist. *Id.* at A4-A5. Each of them submitted a recommendation to the director of the Commission's Bureau of Consumer Protection, who then authorized an expanded, "full-phase" investigation. *Ibid.*

During both phases of the investigation the FTC requested and received a broad range of information from Steinway and from various others, including Steinway's competitors. Pet. App. A5. In the initial phase, the Commission explicitly communicated to Steinway the Commission's understanding that information provided in response to its request would be "provided voluntarily in lieu of compulsory process in a law enforcement investigation," and would therefore be exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. 552, and Section 21(f) of the Federal

Trade Commission Act, 15 U.S.C. 57b-2(f).[1] Pet. App. A5 (quoting FTC letter). Similar assurances were made to Steinway and others when they provided additional information during the later "full-phase" investigation. *Ibid.* The FTC also engaged a consultant to assist in the investigation by inspecting a number of Steinway pianos and advising about the existence and extent of any defects. *Id.* at A6.

In December, 1991, the investigating FTC attorney prepared a memorandum analyzing the case and making a recommendation as to whether the Commission should close the investigation or proceed with legal action against Steinway. In January, 1992, the director of the Bureau of Consumer Protection decided to close the investigation. Pet. App. A6.

2. Shortly after the Steinway investigation was closed, petitioner requested from the FTC, under FOIA, copies of all letters and other documents gathered by the FTC during the course of the investigation. Pet. App. A6. The FTC granted the request in part and denied it in part. As to records voluntarily submitted by Steinway and others, the Commission invoked the exemptions provided by 5 U.S.C. 552(b)(3) and (4) (Exemptions 3 and

---

[1] Section 21(f) provides that:

> Any material which is received by the Commission in any investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission, and which is provided pursuant to any compulsory process under this subchapter or which is provided voluntarily in place of such compulsory process shall be exempt from disclosure under section 552 of title 5.

4).[2] As to internal FTC documents, including memoranda, recommendations, and the reports of the Commission's consultant, the FTC invoked the exemption provided by 5 U.S.C. 552(b)(5) (Exemption 5).[3]

Petitioner pursued an administrative appeal, which was denied by the FTC's General Counsel in May, 1992. Pet. App. A6. Petitioner then filed the present action. The district court granted summary judgment in favor of the FTC as to all of the documents requested. *Id.* at A18-A21. The court rejected (*id.* at A19) petitioner's argument that the FTC was required to threaten the use of compulsory process before a party providing information voluntarily could become entitled to the confidentiality provisions of 15 U.S.C. 57b-2(f). The court also upheld the FTC's withholding of documents

---

[2] Exemption 4 applies to confidential trade secrets and commercial or financial information. Exemption 3 applies to matters that are

> specifically exempted from disclosure by statute * * *, provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

See note 1, *supra*.

[3] Exemption 5 covers "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." It incorporates into FOIA the general evidentiary privileges, including the governmental deliberative process and attorney work-product privileges. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 148-149 (1975). With respect to several of the documents withheld under Exemption 5, the FTC also invoked Exemption 3 to the extent that the documents reflected information provided by Steinway and others.

under Exemption 5 (Pet. App. A19), holding that all of those documents were protected by the attorney work-product doctrine, the governmental deliberative process privilege, or both. In particular, the court held that a staff attorney's memorandum recommending closing an investigation would be covered by both privileges. *Id.* at A19-A20.

3. The court of appeals affirmed the district court's grant of summary judgment with respect to all documents withheld under Exemption 5. Pet. App. A17. The court concluded that petitioner had failed to raise a genuine issue of fact as to whether particular documents were created in anticipation of litigation, in the case of the work-product doctrine, or were created as part of the Commission's decision-making process (rather than created afterwards as an explanation of a decision already rendered), in the case of the governmental deliberation privilege. *Id.* at A14-A17.

The court of appeals vacated the grant of summary judgment based on Exemption 3, however, and remanded the case for further proceedings with respect to the documents withheld solely under that provision. The court first noted (Pet. App. A9) an apparent disagreement among the circuits as to whether courts should defer to broad agency interpretations of statutes (such as Section 21(f)) that authorize the agency to withhold information otherwise subject to disclosure under FOIA, or instead interpret such statutes *de novo* and narrowly, in accordance with a policy of full disclosure derived from FOIA. The court found it unnecessary, however, to address any such issue in this case, instead "looking to the plain language of [Section 21(f)] and its legislative history, in order to determine legislative purpose." Pet. App. A9-A10.

Based on that independent analysis, the court concluded (Pet. App. A11-A13) that the district court had improperly read Section 21(f) to create, in effect, "a blanket exemption from FOIA for all documents submitted * * * voluntarily" to the FTC. Pet. App. A13. The court instead directed the district court on remand to apply a three-factor standard under Section 21(f), allowing the FTC to withhold information only where it could show that "(1) it had requested documents that were (2) relevant to an ongoing investigation within its jurisdiction and (3) the documents could have been subpoenaed had the party refused to comply with the FTC's requests." Pet. App. A13.

ARGUMENT

1. a. Petitioner's primary argument (Pet. 7-9) concerns the proper scope of Section 21(f), as incorporated through FOIA Exemption 3. That issue is not ripe for review in this case. The court of appeals vacated the district court's grant of summary judgment under Section 21(f), and remanded the case for further proceedings. That decision places petitioner in the same position as if the FTC's motion for summary judgment had been denied. The district court has yet to apply Section 21(f) to any of the documents actually at issue in this case.

Petitioner seeks review of the court of appeals' direction to the district court about the proper construction of Section 21(f). But "[t]his Court 'reviews judgments, not statements in opinions,'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)), and until the district court has applied the court of appeals' construction to the documents actually at issue in this case, there is no judgment on that issue to review.

Moreover, any documents that the court concludes are not exempt under the court of appeals' interpretation of Section 21(f) may nonetheless contain confidential commercial or financial information protected by FOIA Exemption 4, a ground for non-disclosure asserted by the FTC but not heretofore addressed by the district court. See Pet. App. A6, A18-A20. Further review of the case at this time would therefore be distinctly premature.

b. Even if the decision with respect to Section 21(f) were not interlocutory, it would not merit further review. It is true, as the court of appeals recognized (Pet. App. A8-A9), that different circuit courts have articulated somewhat different approaches to reviewing an agency's contention that information is protected from disclosure by a special withholding provision in a statute that the agency administers, as incorporated by FOIA Exemption 3. Compare *Aronson* v. *IRS*, 973 F.2d 962, 965-966 (1st Cir. 1992) (Breyer, J.) (deference to agency's interpretation) with *Anderson* v. *Department of Health & Human Servs.*, 907 F.2d 936, 951 & n.19 (10th Cir. 1990) (no deference to agency's regulations prohibiting disclosure). But the court of appeals did not resolve the disclosure question in this case against petitioner by deferring to the FTC's construction of Section 21(f); indeed, the court vacated a judgment in favor of the FTC, and remanded the case with instructions concerning the court's own view of the statute's scope. The court itself saw "no need to choose sides" (Pet. App. A9) on the question of deference, and this case would not provide an appropriate vehicle for

resolving an issue neither presented by its facts nor considered or passed on by the court below.[4]

c. The court of appeals adopted a reasonable construction of Section 21(f) for application by the district court on remand. The court's interpretation (Pet. App. A13) tracks the language of the statute itself (see note 1, *supra*), and the decision below merely requires the district court to conduct a somewhat more exacting review of whether particular documents at issue in this case were provided voluntarily "in place of * * * compulsory process," 15 U.S.C. 57b-2(f), rather than under circumstances that would not have allowed the Commission to compel production in the first place. That is consistent with the evident policy of Section 21(f), which is to protect otherwise confidential information that the Commission has requested private parties to divulge to assist it in the performance of its duties, without forcing either the parties or the Commission to go through the formality of insisting upon and issuing compulsory process. Petitioner cites

---

[4] Petitioner posits (Pet. 6, 8) a broader conflict between *Aronson* and *Anderson*, contending that they differ over whether statutory withholding provisions incorporated by Exemption 3 should be construed "narrowly" or "broadly." That question is different from the question of deference actually addressed in the First and Tenth Circuits' decisions. In any event, the court in this case explicitly eschewed (Pet. App. A9-A10) reliance on any general rule of broad or narrow construction, instead approaching the issue presented as a straightforward one to be resolved by "looking to the plain language of the statute and its legislative history, in order to determine legislative purpose." The fact that by doing so the court reached a particular result does not indicate, as petitioner contends (Pet. 8), that the decision "implicitly agreed with *Aronson*" by "not apply[ing] a narrow rule of construction."

no case that adopts a different interpretation of the statute.

2. Petitioner argues briefly (Pet. 10) that in applying FOIA Exemption 5, the courts below improperly "extend[ed] the attorney work product privilege from the litigation context to the investigative context." That assertion is so cursory as to require little response. There is no indication that either the district court or the court of appeals misinterpreted the proper scope of the work-product doctrine. Cases applying that doctrine under Exemption 5 have recognized that when government attorneys whose primary function is to identify and prosecute violations of the law undertake active investigation of a specific factual situation, their work product generally falls within the realm of materials created "with an eye toward litigation." Pet. App. A15, quoting *Hickman* v. *Taylor*, 329 U.S. 495, 511 (1947); see also, *e.g.*, *SafeCard Services, Inc.* v. *SEC*, 926 F.2d 1197, 1202-1203 (D.C. Cir. 1991); *Kent Corp.* v. *NLRB*, 530 F.2d 612, 623-624 (5th Cir.), cert. denied, 429 U.S. 920 (1976). This case, like *SafeCard Services*, involves documents prepared "in the course of an active investigation focusing upon specific events and a specific possible violation by a specific party." 926 F.2d at 1203. Petitioner's apparent contention (Pet. 10) that the work-product doctrine should apply to such documents only when the investigation results in "actual litigation" or a "public explanation" of the agency's ultimate decision not to take enforcement action is without foundation in the law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LEONARD SCHAITMAN
MARK C. NILES
Attorneys

NOVEMBER 1994